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**IN THE  
COURT OF APPEALS OF INDIANA**

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ROBERT WILLOUGHBY,  
  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
  
Appellee-Plaintiff.

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No. 29A02-0604-PC-348

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APPEAL FROM THE HAMILTON SUPERIOR COURT  
The Honorable Steven Nation, Judge  
Cause No. 29D01-0411-PC-108

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**March 13, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## **Case Summary**

Robert Willoughby appeals the denial of his petition for post-conviction relief. He contends that his guilty plea was not knowingly, intelligently, and voluntarily entered because he was under the influence of prescribed psychiatric medications that affected his ability to participate in the trial court's proceedings at the plea hearing. He further alleges that his trial counsel was ineffective for failing to adequately pursue a defense or guilty plea based on his mental illness. We find that Willoughby failed to present sufficient evidence to the post-conviction court supporting his claim regarding his guilty plea, and he failed to adequately demonstrate a reasonable probability that the result of the proceeding would have been different but for trial counsel's allegedly inadequate representation. As such, we affirm the post-conviction court's denial of relief.

## **Facts and Procedural History**

On November 11, 1999, the State charged Willoughby with Armed Robbery, a Class B felony,<sup>1</sup> stemming from his robbery of a Village Pantry convenience store on October 20, 1999. Willoughby obtained legal representation through attorney William Greenaway. At a hearing held on November 30, 2000, Willoughby pled guilty to the charge in exchange for a sentencing cap of twelve years. At this hearing, the trial court engaged Willoughby in a colloquy regarding his treatment for mental illness. *See* Appellant's App. p. 72-73 (Tr. of Plea Hearing). Willoughby testified that he was then residing in the psychiatric unit of the Westville Correctional Facility. He further indicated that he was being treated for Bipolar Disorder and Anxiety Disorder with the

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<sup>1</sup> Ind. Code § 35-42-5-1.

prescribed drugs Lithium and Klonopin. In response to the trial court's questions, Willoughby testified that he had been taking these drugs intermittently for at least ten years, that he had been taking them in the manner in which they were prescribed for at least the previous thirteen months, that he was aware of how they affected his body, and that he was confident they were not affecting his ability to understand and to participate in the guilty plea proceedings.

The trial court also questioned attorney Greenaway as to whether he believed a guilty plea was in his client's best interests and that Willoughby "understands the proceedings here today and this is a free, voluntary, and knowing act on his part?" *Id.* at 83. Greenaway responded affirmatively. The trial court then questioned Willoughby regarding Greenaway's representation, and he indicated that he was satisfied with the representation he had received.

The court then advised Willoughby of his rights, established a factual basis for Willoughby's guilty plea, ordered a presentence investigation report, and took the guilty plea under advisement pending a sentencing hearing, which it scheduled for May 17, 2001. The State indicated that if the case were to proceed to trial, it would present evidence indicating that Willoughby had been apprehended in possession of several items matching the description of items involved in several robberies, including the October 20, 1999, robbery. These included a brown glove, a pellet pistol resembling a nine-millimeter handgun, a mask, and a large sum of money. The State also cited evidence demonstrating that Willoughby matched the physical description of the suspect as given by an attendant at the store that was robbed, another eyewitness, and as shown on the

store's video surveillance camera. Further, the State would admit evidence of Willoughby's voluntary and detailed confession to police admitting his guilt in the crime.

At the sentencing hearing, Willoughby testified further regarding his mental illness. *See* Appellant's App. p. 100-105 (Tr. of Sent. Hearing). He testified again regarding his Bipolar and Anxiety Disorders and his medications. He further informed the court that he had received a severe head injury in a car accident in 1991 that left him comatose for some time and also resulted in a seizure disorder. The State presented evidence regarding Willoughby's substantial criminal history and commented that Willoughby's testimony suggested that although he pled guilty, he failed to take responsibility for his past crimes or behavior. Following this testimony, the trial court accepted Willoughby's guilty plea and entered conviction. The trial court proceeded to sentence Willoughby, finding:

that the Defendant does have a history of criminal activity, that the person also has recently violated conditions of parole from the Clinton County case. The Court finds that also the Defendant is in need of correctional rehabilitative treatment provided by the Department of Corrections. The Court also finds that this Defendant has a high risk of future violations of the law. I was impressed by the fact that it seems that he still is making excuses and blaming other people. Even his remorse has to deal with that he does not want things hanging over his head and not taking into account the harm that he has caused the community. He's had problems on probation. He's had problems with the legal system. When things go wrong, he feels he has the right to commit crimes and not property crimes, but crimes against persons. The Court finds, therefore, the aggravating circumstances outweigh any mitigating circumstances and the Court can find none at this point.

*Id.* at 127. The trial court then sentenced Willoughby to twelve years, the maximum term allowed under the plea agreement.

Willoughby did not file a direct appeal, but he filed a petition for post-conviction relief on November 5, 2004, and an Interlinear Amendment to that petition on April 1, 2005. An evidentiary hearing was held on the matter on June 6, 2005. Willoughby raised two grounds for relief before the post-conviction court. First, he argued that his guilty plea was not intelligently, knowingly, and voluntarily entered because he was under the influence of his prescribed medications, and this prevented him from being able to fully understand and appreciate the proceedings. Second, he argued that attorney Greenaway, as trial counsel, was ineffective because although Greenaway was aware of Willoughby's mental illness and had contact information for his various physicians, Greenaway failed to pursue a plea agreement for a conviction of guilty but mentally ill or to offer evidence of Willoughby's mental illness as mitigation at the sentencing hearing. Willoughby submitted an affidavit from Greenaway indicating that he had no independent recollection of his representation of Willoughby beyond that contained in the transcript. Further, Greenaway provided that he believed he was competent in his representation and that, to the best of his knowledge, he discussed the State's evidence with Willoughby and explored all potential defenses available in the case.

The post-conviction court entered its Findings of Fact, Conclusions of Law and Order Denying Post Conviction Relief on September 15, 2005. Willoughby failed to file a timely appeal due to an error in his post-conviction attorney's office, and Willoughby filed a Trial Rule 60 Motion for Relief from Judgment on October 31, 2005. The post-conviction court responded by vacating its September 15, 2005, order, then re-entering judgment on April 13, 2006, thereby preserving Willoughby's opportunity for a timely

appeal. On April 24, 2006, Willoughby filed his timely Notice of Appeal, initiating the present action in this Court.

### **Discussion and Decision**

Willoughby appeals the denial of his petition for post-conviction relief. In order to obtain post-conviction relief, a petitioner must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1, § 5. Consequently, a petitioner who has been denied post-conviction relief faces a rigorous standard of review. *Benefiel v. State*, 716 N.E.2d 906, 912 (Ind. 1999), *reh’g denied*. To prevail on appeal, the petitioner must establish that the evidence as a whole “leads unerringly and unmistakably to a decision opposite that reached by the trial court.” *Prowell v. State*, 741 N.E.2d 704, 708 (Ind. 2001). Stated otherwise, we will disturb a post-conviction court’s decision only where the evidence is uncontradicted and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. *Miller v. State*, 702 N.E.2d 1053, 1058 (Ind. 1998), *reh’g denied*.

Willoughby contends that the post-conviction court erred in determining that his guilty plea was knowingly, intelligently, and voluntarily entered and that his counsel was not ineffective. We address each issue in turn.

#### **I. Knowing, Intelligent, and Voluntary Guilty Plea**

Willoughby insists that his guilty plea was not knowingly, intelligently, and voluntarily entered “due to the bipolar disorder and medications that inhibited [his] ability to render an intelligently [sic] decision with rational understanding of the proceedings.” Appellant’s Br. p. 6. He argues that “the post-conviction court

erroneously base[d] its findings and conclusions of law upon the factor that Defendant exhibited competency to enter the guilty plea,” *id.* at 7, which he contends is a fundamentally different inquiry than whether a defendant knowingly, intelligently, and voluntarily enters a plea.

First, we disagree with Willoughby’s characterization of the post-conviction court’s findings and conclusions. After discussing the testimony at the guilty plea and sentencing hearings in numerous findings, the post-conviction court entered the following findings and conclusions:

9. That the Record shows that the Petitioner was *knowledgeable of the issues of his case and the proceedings*, and at no time did his actions or statements cause the Defendant’s counsel or the trial [c]ourt to question his ability to *understand his rights and/or these proceedings*.
10. The only evidence produced at the post-conviction hearing was testimony from the Petitioner of what medication he was taking at the time of the guilty plea and sentencing hearings. Contrary to Petitioner’s argument, there is no indication that Robert Willoughby has any history of mental illness.
11. Therefore, at the time the plea was made, Petitioner had a *complete awareness of events and their significance* and had the capacity to weigh the alternatives available to him at the time.

Appellant’s App. p. 16 (emphases added). This indicates that the post-conviction court evaluated Willoughby’s claims under the appropriate knowing, intelligent, and voluntary standard and that its findings and conclusions comport with such an analysis.

Furthermore, we find no error in the post-conviction court’s analysis of Willoughby’s guilty plea. Indeed, we find this case to be analogous to *Baker v. State*, 768 N.E.2d 477 (Ind. Ct. App. 2002). Like Willoughby, Baker argued that he was unable to understand and fully appreciate the events surrounding his guilty plea because he was under the influence of psychiatric medications. Also like Willoughby, Baker was

subjected to the questioning of the trial court regarding his medications, how long he had taken them, his familiarity with their effects on his mind and body, and whether those medications affected his ability to enter a knowing, intelligent, and voluntary guilty plea. And like Willoughby, Baker provided coherent, logical answers to the court's questions. We held, then, that:

Based upon our review of the transcript of the guilty plea hearing, we do not see any evidence that Baker's use of medication . . . affected him such that he did not knowingly, intelligently, and voluntarily enter his guilty plea. Contrary to his assertion that he could not understand because he was under the influence of medications, his answers reveal that he had been taking the medication for ten years under the guidance of a doctor, allowing him to function appropriately and understand the events in which he took part. . . . Further, he stated that he was competent to go ahead with the trial. . . . Also, none of the responses made by Baker should have raised concern by the trial court that Baker did not understand because the responses were logical and appropriately answered the questions posed by the trial court.

*Id.* at 480.

We find this language entirely on point in the present case. The trial court asked Willoughby a series of questions designed to gauge the effect of his medications and his mental illness on his understanding of the guilty plea proceedings. Willoughby appropriately and logically responded to these questions, detailing his medications, the amount of time he had been taking them, and his awareness of their effects on him. Willoughby indicated that he was fully aware of the proceedings and that he was entering his plea in a knowing, intelligent, and voluntary manner, and his attorney's testimony before the trial court affirmed this. As in *Baker*, nothing in the record before us suggests that Willoughby did not knowingly, intelligently, and voluntarily enter his guilty plea. The post-conviction court committed no error in denying Willoughby relief on this issue.

## II. Ineffective Assistance of Counsel

Willoughby also argues that he was denied the effective assistance of his trial counsel, Greenaway. There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *reh'g denied*. “Counsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled to deferential review.” *Id.* at 746-47. “Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render the representation ineffective.” *Id.* at 747.

To establish a post-conviction claim alleging a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Wesley v. State*, 788 N.E.2d 1247, 1252 (Ind. 2003), *reh'g denied*. First, a defendant must show that defense counsel’s performance was deficient. *Id.* Second, a defendant must show that the deficient performance prejudiced the defense. *Id.* To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would be different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* “If we can easily dismiss an ineffective assistance claim based upon the prejudice prong, we may do so without addressing whether counsel’s performance was deficient.” *Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002), *reh'g denied*.

Willoughby contends that Greenaway was ineffective because even though he was aware of Willoughby's mental illness and had contact information for various physicians who had treated Willoughby, he did not pursue a mental illness defense, seek a plea of guilty but mentally ill, or present Willoughby's mental illness as a mitigator to the trial court. However, we find—as the post-conviction court did—that Willoughby failed to support these assertions before the post-conviction court.

At both the guilty plea and sentencing hearings, Willoughby testified at some length regarding his mental illness and his medications. He also indicated that he was satisfied with his attorney's representation. This was sufficient to place the issue before the trial court for consideration as a mitigator, even if the trial court chose not to consider it against the multiple aggravators it cited. *See Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005) (“[A] trial court is not obligated to weigh or credit the mitigating factors in the manner a defendant suggests they should be weighed or credited.”).

With regard to the possibility of a mental illness defense or a plea of guilty but mentally ill, the post-conviction court correctly noted that Willoughby produced no evidence aside from his own testimony *at the post-conviction hearing* indicating that his mental illness at the time of his crime was such that a mental illness or insanity defense was available and warranted. Willoughby argues that because it is clear from the evidence presented at the guilty plea and sentencing hearings that Greenaway was aware of Willoughby's mental illness, this is sufficient to suggest to the post-conviction court that Greenaway should have pursued a defense or guilty plea predicated on mental illness. This is not enough. Willoughby needed to demonstrate to the post-conviction

court that the extent and severity of his mental illness justified a mental illness defense, and he needed to make a showing that Greenaway, based on that information, should have pursued a different legal remedy. Absent evidence that a mental illness defense was available to Willoughby at the trial level, the post-conviction court cannot be said to have erred when it determined that Greenaway was not ineffective for failing to pursue such a defense. We therefore affirm the post-conviction court.

Affirmed.

BAILEY, J., and BARNES, J., concur.